

May 8, 1950

Neil V. Christensen, County Attorney  
Coconino County  
Flagstaff, Arizona

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ARIZONA ATTORNEY GENERAL

Dear Neil:

We have your request which you made the other day to Mr. Wilson by telephone. As we understand your question, it is:

May a person employed by the Highway Department as a maintenance man seek election to the office of Justice of the Peace? And further, may he hold both jobs and receive salaries for the same?

It is our opinion that a Highway Department employee is not forbidden by law from doing these things. First we would like to direct your attention to Section 59-108 ACA 1939, which provides:

"Prohibiting political activity.--  
No commissioner, state highway engineer, secretary or any employee of the Arizona Highway Department, shall serve on any committee of any political party, nor engage in political activities other than voting. Any violation of this section shall be cause for dismissal or removal from the department."

It is our belief that the words used clearly import that being a candidate for office is to "engage in political activities". Certainly if an employee of the Highway Department became a candidate for a public office he would subject himself to dismissal or removal from his job. However, his removal would definitely not be automatic, but would be subject to the wishes of his superiors.

This sort of legislation has been almost uniformly upheld and has been said not to violate constitutional rights. 163 ALR 1363.

Without considering the question of political activities and assuming that the person in question were appointed to the office of Justice of the Peace or acquired the office when he was not employed by the Highway Department, then, as a legal proposition, the person would not be precluded from holding both jobs and from receiving salaries for them.

It must be determined under this last state of facts whether or not a person engaged in the maintenance of the highways is a public officer. We assume herein that the person in question is merely a laborer or workman and is not an engineer or person acting in a supervisory capacity or in an office created by law.

The Arizona cases settle rather clearly the question of who is a public officer. This question came up in the case of Winsor v. Hunt, 29 Ariz. 504, 243 P. 407, and in that case the court said that there were three elements which must be present in order that a person be a public officer. These are:

1. The specific position must be created by law;
2. Definite duties must be imposed by law; and
3. These duties must involve the exercise of some portion of the sovereign power.

The above mentioned case was cited and quoted at length in Stapleton v. Frohmler, 53 Ariz. 11, 85 P. 2d 49. It is our view that under these two cases a person engaged only in highway maintenance could under no circumstances be a public officer. Clearly a Justice of the Peace is a public officer.

You are doubtless aware that the common-law rule on incompatibility of offices presupposes public offices and is not meant to apply to mere employees or servants who have no discretionary duties. This is also the tenor of Article 1, Chapter 12 ACA 1939 and of the applicable constitutional provisions.

If a person attempted to perform the duties of both positions, it can readily be perceived that numerous and serious complications of a practical rather than a legal nature would arise. However, it is the general rule that incompatibility of the prescribed duties is the test and physical incompatibility or the impossibility of proper performance of two positions by a person is not considered in determining incompatibility of offices under the common-law rule. LRA 1917A, 216. However, one Arizona case seems to state that physical impossibility of a person to do the work of two public offices renders the same incompatible. Perkins v. Manning, 59 Ariz. 60, 122 P. 2d 857. This is undoubtedly the minority rule, and admitting it to be the law of Arizona, it still cannot apply to this situation for the simple reason that the position of maintenance man for the Highway Department is not a public office.

We seriously doubt that any person could properly perform the duties imposed by these two positions; however, we feel that these are questions of practical scope rather than legal

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propriety and these questions, of course, must be resolved by whoever appoints the person in question to the office of Justice of the Peace or hires him while he is acting as Justice of the Peace to work as a highway maintenance man.

It is our conclusion that from a purely legal viewpoint the person may be employed as a highway maintenance man and at the same time may also serve in the office of Justice of the Peace and receive remuneration for both positions. This conclusion, of course, is made subject to the provisions of Section 59-108, supra, and it is our belief that this section does not legally preclude a person who is an employee of the Highway Department from seeking public office. However, it most certainly would subject him to dismissal or removal from the department, which, of course, would have to be brought about by the employee's superiors rather than by operation of law.

Yours very truly,

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